FOR ARGUMENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, et al.,
Petitioners,

vs.

MARIE MANHART, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)
and
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

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This brief *amici curiae* is filed in support of the position of the respondents by the International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF AMICI CURIAE

The UAW is this country's largest industrial labor union with approximately 1,300,000 members in the United States, over 210,000 of whom are working women. Among the UAW's principal objectives is the protection of the welfare and security of its members after retirement. The UAW has historically placed heavy emphasis on the establishment of pension plans in negotiating collective bargaining agreements. Its staff includes four professional actuaries who help formulate UAW plans and monitor similar plans in other industries. The UAW has negotiated approximately 1,500 pension plans covering almost all of its American workers.

The AFL-CIO is a federation of 109 national and international unions, having a total membership of approximately 14,000,000 workers, a substantial portion of whom are women. As such, it is the principal spokesman for the American trade union movement. Virtually all AFL-CIO affiliates negotiate pension plans for their members in the course of collective bargaining, and many affiliates play a role in the administration of such plans.

Contrary to the implication in several of the briefs *amici curiae* filed in support of petitioners, most single-employer defined-benefit pension plans in American industry today are "sex-neutral" plans that do not charge women a greater contribution and do not pay women lower benefits at retirement. Almost all the UAW's 1,500 existing plans are "sex-neutral" in this respect, as are the great majority of defined-benefit plans negotiated by AFL-CIO affiliates.

As the experience of the UAW and AFL-CIO affiliates proves, pension plans need not be sex-discriminatory to be actuarially sound. Indeed, sex-discriminatory pension plans are the exception rather than the rule, historically being confined to educational and governmental institutions, and they have been decreasing in usage in recent years.

In this brief, we seek to dispel the impression that sex-discriminatory pension plans are a practical necessity, and that the overt sex discrimination apparent from the face of these plans is compatible with the provisions of Title VII of the 1964 Civil Rights Act. As a corollary, we will show that the "sex-neutral" plans negotiated by the trade union movement throughout American industry are not unfair to men.

Petitioners have also raised fundamental questions about the test to be applied in determining whether a given employment practice that discriminates against women violates Title VII. As representatives of millions of working women, and as leaders in the effort to eliminate sex discrimination in employment, the UAW and AFL-CIO have a vital interest in

assuring that the standards for determining sex discrimination under Title VII are not weakened.

SUMMARY OF ARGUMENT

I. Conceptually, this is a very simple case. Since all women employed by the City of Los Angeles Department of Water and Power take home less pay than men in the same job but receive no more in periodic pension benefits when they retire, there is plainly disparate treatment based directly upon gender. Such treatment is at the core of the evils Title VII was intended to prevent, and this Court has never doubted that any employment practice that explicitly and overtly treats women differently from men violates Title VII unless there is an affirmative defense applicable. Only where an employment practice is based upon facially neutral principles is it necessary to inquire into its effect upon women as a group in order to determine whether there is a Title VII violation. *Dothard v. Rawlinson,* ..... U.S. ....., 45 U.S.L.W. 4888 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 127 (1976).

The discriminatory policy cannot be justified by the fact that it is based upon a statistically significant correlation between a prohibited classification—gender—and a neutral factor—longevity. Title VII does not permit individuals in protected classifications to be treated according to group characteristics. Here, in fact, since over eighty percent of men and women die at the same age, such treatment harms 80% of the

women because 20% of the women live longer lives, and benefits 80% of the men because 20% of the men live shorter lives. A plainer example of the sort of harm which Title VII was intended to prevent is hard to imagine.

It is not necessary to declare the Department's discriminatory policy "irrational" in order to find a Title VII violation. The same standard of scrutiny applies under Title VII to race and to sex discriminatory policies, except that there are two affirmative defenses to sex discrimination not available with respect to race discrimination. Therefore, the Department's policy violates Title VII unless the only pertinent defense, the Bennett Amendment, provides an exemption.

II. Before discussing the Bennett Amendment issue, however, we discuss the arguments that the ordinary Title VII principles are inherently anomalous in the insurance context, and that Congress must therefore have intended an exception.

A. Petitioners urge that despite a clear difference in treatment between men and women, there is not any inequality here, because women will receive retirement benefits for a longer time and therefore can be fairly asked to contribute more toward those benefits. But, even though women as a group live to a higher average age, no individual woman has any assurance whatever that she will collect more in benefits than any individual man, or even than the average man. Thus, what the Department's policy does is to distribute among women only, and not among employees

generally, the cost of paying retirement benefits to those comparatively few women who live longer than the average male. The fact that a discriminatory policy does not harm, or even favors certain members of a protected class does not save it where there is *per se* discrimination. *Gilbert, supra,* is not to the contrary; in *Gilbert,* only those women who incurred the excluded additional risk, and not all women, were affected by the policy excluding pregnancy from disability coverage.

B. While insurance is based on the pooling of risks among large groups of people, there is nothing inherent in insurance which mandates subdivision of an insured group along gender lines. To prohibit such subdivision for employee benefit programs is not irtional, economically naive, or fundamentally unfair to men.

First, there are many other subgroupings which would be available if it were desired to classify employees by risk of longevity. The fact that these are not used indicates that longevity subgroupings are *not* necessary.

Further, this Court's sex discrimination cases "have . . . rejected the use of sex as a decision-making factor even though the [policies] in question . . . rested on . . . predictive empirical relationships." *Craig v. Boren,* 429 U.S. 190, 202 (1977). Nor is insurance special in that it is not possible to determine which members of a group actually have the relevant characteristic. This was true in *Craig,* and in other sex discrimination cases as well.

Second, there is no economically compelling reason for the sex classification. While it may be necessary, where purchase of insurance is voluntary, to price either contributions or benefits by degree of risk in order to avoid adverse selection, the adverse selection theory has no application where, as here, individuals have no choice whether to be covered by the pension plan or not.

Third, while, in a sex-neutral benefit plan, men as a group can be said to "subsidize" women as a group, there is nothing unfair about this. Mandatory group benefit programs rely, in fact, upon cross-subsidization of high risk persons by low risk persons for their strength—providing adequate and basically equal coverage to people in many different life situations. Thus, the assertion that a sex-neutral plan unfairly discriminates against men really amounts to the contention that low risk men are somehow entitled to be sure that "their" money is used only for high risk men and not for high risk women. This contention is an example of exactly the sort of rigid gender-based approach to employment relationships which Title VII prohibits.

Finally, not only is there no reason inherent in insurance principles for supposing that Congress created an implied exception for gender-based differences in treatment under employee benefit plans, but there are express indications that no exception was intended. The first is that the Age Discrimination in Employment Act, otherwise quite similar to Title VII, contains an express exemption for pension and retirement

plans. The legislative history shows that the reason for this exemption was the understanding that otherwise, the equality principle would require that the same benefits be provided under employee benefit programs to workers older when hired. Second, in 1970, an attempt was made to amend Title VII itself to exclude employee benefit programs, but this attempt failed.

III. The only statutory defense possibly applicable here is the Bennett Amendment, which provides that any wage differential based on sex "authorized" by the Equal Pay Act does not violate Title VII. To be within the Bennett Amendment exemption, an employment practice must first be determined to be a wage differential, for the Equal Pay Act is concerned only with wages. Because the Equal Pay Act is part of the minimum wage section of the Fair Labor Standards Act, the concepts used in the minimum wage context apply. And, pension programs are not "wages" for purposes of the minimum wage provisions. Thus, the discrimination here is not within the purview of the Equal Pay Act at all and could not possibly be "authorized" by that Act.

Moreover, even if this were considered a case of discrimination in wage rates, the Equal Pay Act would not permit the differential. For, that Act prohibits such a differential unless justified by a seniority, merit, or productivity system, or by "any other factor other than sex." The language, structure, and legislative history of the Act all lead to the conclusion that "any factor other than sex" must be a facially neutral

factor and not one itself based upon gender. While petitioners contend that the legislative history demonstrates a specific intention, nonetheless, to permit gender-based distinctions in employee benefit plans, the material contemporaneous with the passage of the Equal Pay Act contains no such permission.

Since this is a clear case of gender-based discrimination, and since there is no applicable statutory defense, the judgment below should be affirmed.

ARGUMENT

I

THE POLICY REQUIRING ALL WOMEN TO CONTRIBUTE MORE TOWARD PENSION BENEFITS THAN ALL MEN IS A PER SE VIOLATION OF TITLE VII UNLESS THERE IS A STATUTORY AFFIRMATIVE DEFENSE

The length and complexity of the briefs of petitioners, and of amici supporting their position, belie the fact that conceptually, this is a rather simple case. All women who work for the City of Los Angeles Department of Water and Power (hereafter "the Department") take home in each pay check less than men holding the same job. The difference in take-home pay between men and women is explained as a higher periodic contribution by women toward the pensions they will receive when they retire. But, upon retirement, women receive no more than men in periodic benefits. The result is that all women have less money to live on each month while they are working, and no more to live on each month when they retire.

A clearer case of gender-based discrimination prohibited by Section 703 of Title VII is hard to conceive. All women are treated differently than all men. And,

> "disparate treatment [based on race, color, religion, sex, or national origin] was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Senator Humphrey) ('[the bill] . . . provides that men and women shall be employed on the basis of their qualifications, not as . . . [women] citizens, but as citizens of the United States.')"
>
> *Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

This Court has never doubted that any employment practice that explicitly and overtly treats women differently than men violates Section 703 of Title VII, unless an affirmative defense is available. For example, in *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), the Court was faced with a policy forbidding the hiring of women, but not men, with preschool age children. The court of appeals had ruled that there was no sex discrimination because most of the employees who were hired were women, and women as a group were therefore not harmed. In its first decision construing Title VII's prohibition of sex discrimination, the Court reversed in a brief *per curiam* opinion. Regardless of the effect upon women as a group, the Court declared, employers may not ordinarily "have one policy for men and one for women each having pre-school age children." *Id.,* at 544.

While it may be, said the Court, that "the existence of . . . conflicting family obligations is demonstrably more relevant to job performance for a woman than for a man," this justification was not relevant to whether there was discrimination, although it "could arguably" constitute an affirmative defense under Section 703(e) of the Act. *Id.*[1]

In *Dothard v. Rawlinson,* ..... U.S. ....., 45 U.S.L.W. 4888 (1977), the Court dealt with two different policies alleged to discriminate on the basis of sex: a height and weight limitation asserted to disqualify many women, without justification, and an exclusion of all women from certain positions. In considering the first policy, the Court, applying the standards for disparate impact cases (*see Teamsters, supra,* 431 U.S., at 335 n.15), analyzed first the effect of the height and weight limits on women and then whether the facially neutral policy, despite its disparate impact, was justified because necessary to the employment in question. But in considering the second policy which, like the policy in the present case, drew an explicit gender-based line, the Court did not inquire into either impact or necessity; instead, it asked only whether an explicit statutory defense was applicable, and concluded that it was.

Similarly, in *General Electric Co. v. Gilbert,* 429 U.S. 127 (1976), the Court, faced with an employment

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[1]Section 703(e), 42 U.S.C. § 2000e-2(e), permits gender-based discrimination where gender is a "bona fide occupation qualification ["bfoq"] reasonably necessary to the normal operation of that particular business or enterprise."

policy denying disability benefits for pregnancy but otherwise treating men and women alike, first inquired into whether that policy was "sex-based discrimination as such." 429 U.S., at 135. It concluded that it was not, because "[t]he program divides potential recipients into two groups—pregnant women and non-pregnant persons." *Id.,* quoting *Geduldig v. Aiello,* 417 U.S. 484, 496-97 n.10. Only *after* determining that discrimination based on pregnancy is not overt sex discrimination did the Court proceed to discuss the *effect* of the policy upon women, concluding that exclusion of pregnancy did not "discriminate against any definable group or class in terms of . . . aggregate risk protection." *Id.,* at 138; *see also Nashville Gas Co. v. Satty,* ..... U.S. ..... (December 6, 1977).[2]

Petitioners, however, maintain that the present case differs from other *per se* sex discrimination cases because the differential treatment is based on an objectively verifiable fact: that the *average* age at death is higher for women as a group than for men as a group. This, they contend, demonstrates that the difference in treatment is based on longevity rather than gender. Alternatively, they claim that the statistical correlation between gender and longevity shows that their differential treatment of men and women along explicit gender lines is rational, and that this showing is all that Title VII requires.

---

[2]*Satty* stressed twice that the analysis in *Gilbert* regarding "aggregate risk protection" applied only "when confronted by a facially neutral plan." *Satty,* slip op., at 8.

The notion that when a statistical correlation exists between some legitimate factor and a statutorily prohibited category such as gender, race, national origin, or religion, different treatment of *all* members of the group is not discrimination under Title VII is quite astonishing. For the most fundamental principle of Title VII is that persons should be treated as individuals rather than as members of groups drawn along prohibited lines. For example, "[i]t is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." *Dothard, supra,* ..... U.S., at .....; 45 U.S.L.W., at 4891. And this prohibition applies whether the "stereotype" is a subjective perception or a verifiable fact about the group in the aggregate; either way, the individual is being treated in a certain way because of membership in a certain group, although he or she may not share the characteristics that other members of the group are thought to, or do, exhibit.

In the present case, the harmful effect of being treated on the basis of group averages is felt not by a handful of women, but by most of them. Analysis reveals that the difference in *average* longevity between men and women results from the fact that about 16% of men die quite young, while about 16% of women live to be quite old; the remaining men and women—more than 80% of each group—share common death ages. *Reilly v. Robertson,* 360 N.E.2d 171, 176 (Ind.Sup.Ct. 1977); *Henderson v. Oregon,* 405

F.Supp. 1271, 1275 n.5 (D.Ore. 1975).[3] This fact means that more than 80% of the women are penalized because less than 20% of women live longer lives, and conversely, more than 80% of the men benefit because less than 20% of men live shorter lives. A

[3]Petitioners, and amici appearing in their support, accept these figures as accurate but question their significance. They point out that if men and women of the same age at retirement are matched not by year of death but by order of death, it will turn out that the male in each pair will be much younger than the female in each pair. But, this is just another way of saying that the difference in the average in this instance is accounted for by large differences at the extremes rather than persistent differences affecting all or most men and women.

For example, the following chart shows two groups of ten numbers, which have a difference in averages of 1.6:

10	
10	
9	9
9	9
7	7
6	6
6	6
5	5
5	5
4	4
4	4
	2
	2
Average 7.5	5.9

Eighty percent of the numbers in each group are the same; the difference in averages results because two numbers in the first group are quite high and two numbers in the second group are quite low. If one matched these numbers in order, however, the one on the left would always be higher than the corresponding number on the right.

In the present context, the relevant consideration is age at death, not order of death. Retirement benefits are paid for the number of years one lives after retirement, so that a person's age at death is a measure of the total amount of money the fund will pay to that person. The order in which people die does not affect the amount of money *each* beneficiary receives, in total, from the fund.

plainer example of the sort of harm which Title VII was intended to prevent is hard to imagine.

The second contention—that the Department's overt discrimination does not violate Title VII because it has a rational basis—is based on the suggestion that Congress intended, or, because of constitutional considerations, must be assumed to have intended, a lesser standard of scrutiny under Title VII for sex than for race.[4]

This Court has never recognized any such distinction under Title VII. Title VII does differentiate between race and sex classifications in that it provides two special statutory defenses to sex discrimination: Section 703(e), the "bfoq" distinction; and the last sentence of Section 703(h), the "Bennett Amendment," which permits sex discrimination otherwise violative of Title VII if "authorized" by the Equal Pay Act, 29 U.S.C. § 206(d). But the affirmative prohibitions in Title VII, contained in Section 703(a), treat race and sex in a precisely parallel manner, and therefore the two express defenses must be taken as the only differences between race and sex discrimination for Title VII purposes.

The fact that race and sex classifications are handled differently under the Equal Protection Clause of the Fourteenth Amendment[5] leads to "no necessary

[4]Petitioners do not suggest that a rational purpose suffices to justify race classifications under Title VII.

[5]Even if relevant, this consideration would not lead to the conclusion that a rational basis is sufficient. Under the Fourteenth Amendment, justification of sex discrimination requires more than simple rationality. *Craig v. Boren*, 429 U.S. 190 (1976). Application of the *Craig* test would in our view result in invalidating the Department's plan. *Cf.* pp. 29-32, *infra*.

inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved [under] the Equal Protection Clause." *Gilbert, supra,* 429 U.S., at 133.[6] Not only is the structural parallel between race and sex discrimination in Title VII clear, but in 1972, when Congress enacted the coverage of public employees which created the cause of action here, it expressly disavowed any intention to subject sex discrimination to a lesser standard of scrutiny:

> "[W]omen's rights are not judicial divertissements. Discrimination against women is not less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."
>
> H.R. Rep. 92-238, 92nd Cong., 1st Sess., at 5 (1971); *see also id.,* at 4-5; S.Rep. No. 92-415, 92nd Cong., 1st Sess. at 7-8 (1971).

Finally, the suggestion that Congress was constrained, with respect to public employees,[7] to incorporate into Title VII the Fourteenth Amendment difference in the scrutiny accorded race and sex discrimination entirely misconceives the power of Congress under Section 5 of the Fourteenth Amendment. *Katzenbach v.*

[6]While *Gilbert, supra,* did indicate that Fourteenth Amendment analysis can be relevant in determining whether there is discrimination at all under Title VII (429 U.S. at 133-35), here the issue is not whether there is discrimination based on gender, but the standard of scrutiny once such discrimination is established.

[7]Although petitioners do not acknowledge as much, this argument, if accepted, would lead to different standards for gender-based discrimination under Title VII for public and private employees. For, as to private employees, Congress could clearly legislate whatever standard it chose under the Commerce Clause.

Morgan, 384 U.S. 641 (1966); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).[8]

In sum, overt gender-based discrimination does violate Title VII unless one of the two statutory defenses apply. No one has suggested that the "bfoq" defense is pertinent. We would therefore ordinarily proceed to a discussion of the only defense possibly

[8]Title VII's coverage of public employees was an exercise of Congressional power under Section 5 of the Fourteenth Amendment to pass statutes promoting the purposes of that amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). Legislation passed pursuant to Section 5 is valid if that legislation "may be viewed" as a means of securing equal treatment and the courts can *"perceive* a basis upon which *Congress* might predicate [*its*] *judgment."* *Katzenbach v. Morgan,* 384 U.S. 641, 652, 656 (1966) (emphasis added).

Morgan established 1) that § 5 of the Fourteenth Amendment authorizes Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," (*Id.,* at 651); 2) that in exercising this discretion under § 5, Congress is not limited to the regulation of conduct which a court might find to be violative of § 1 of the Fourteenth Amendment (*Id.,* at 652-53) and 3) that the courts should defer to congressional judgment of "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," as long as the legislation "may be viewed" as a means of securing equal treatment and the courts can "perceive a basis upon which Congress might predicate [its] judgment." *Id.* at 652, 656. Under *Morgan,* Congress, in regulating state activities,

> "has the power to enact any law which may be viewed as a measure for correction of *any* condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."
>
> Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 107 (1966) (emphasis added).

While there were two dissenting Justices (Harlan, J. and Stewart, J.) in *Morgan,* both, in the subsequent case of *Oregon v. Mitchell,* 400 U.S. 112 (1970), accepted the crucial holding of *Morgan,* i.e., that Congress under § 5 can regulate conduct which arguably does not violate § 1 of the Fourteenth Amendment. For example, in discussing the Fifteenth Amendment, Justice Harlan indicated the *"danger of violation* of § 1 . . . was sufficient to authorize the exercise of congressional power under § 2." 400 U.S.

applicable, the Bennett Amendment. However, petitioners and, especially, the amici supporting their position, seem to be suggesting that, because this case involves insurance, established Title VII principles cannot apply. We therefore devote Part II of this brief to demonstrating that there is nothing in insurance or actuarial principles that renders the ordinary Title VII analysis inapplicable, and defer discussion of the Bennett Amendment to Part III.

II

CONGRESS INTENDED ORDINARY TITLE VII PRINCIPLES TO APPLY TO EMPLOYEE BENEFIT PROGRAMS

While petitioners, as noted, argue for a sweeping alteration of the established Title VII analysis of sex discrimination, the several amici appearing on their behalf do not dispute the established principles we have discussed above. Rather, they appear to argue that those principles are inherently inapplicable to

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at 216. Justice Stewart recognized that *Morgan* upheld the power of Congress to

> ". . . override state laws on the ground that they were in fact used as instruments of invidious discrimination *even though a court in an individual lawsuit might not have reached that factual conclusion.*"
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> *Id.*, at 296 (emphasis added).

Most recently *Morgan* was cited by Justice Powell in *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 813 (1976), as authority for deferring to legislative judgments.

In enacting the public employee coverage of Title VII in 1972, Congress explained precisely why it believed that gender-based discrimination in employment requires basically the same level of scrutiny as race discrimination. H.R.Rep. No. 92-238, *supra*, at 4-5; S. Rep. No. 92-415, *supra*, at 7-8. This decision, which surely furthers the right to equal treatment accorded by the Fourteenth Amendment, was a reasonable exercise of discretion and is therefore entitled to deference.

cases involving insurance, and that Congress therefore must have intended a special approach in such cases.

This contention takes two related forms: *first,* the assertion that despite diverse treatment based squarely and overtly on gender lines, women and men are in fact being treated "equally" by the Department; and *second,* the argument that even if inequality exists, ordinary principles cannot apply to invalidate that inequality because there is no rational alternative to sex classifications in the insurance context.

A.

The department's pension plan does not treat similarly situated women and men equally

Petitioners' argument that there is no inequality in this case cognizable under Title VII is perhaps most simply stated in their "loaf of bread" analogy:

> "The [system] may be analogized to [a loaf] of bread accrued at the date of retirement . . . [U]nder the Department's Plan, women are to receive the same size 'slice' of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the 'slices.'"
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> Pet. Br., 4.

While amici use insurance terminology such as "actuarial equality" and "present value," their analysis is basically the same.

The problem, of course, is that while women as a group live longer *on the average* than men as a group, no individual woman is assured that she will collect

any of the "loaf of bread" set aside for her, much less all of it. Indeed, since more than 80% of the women do not live longer than their male counterparts, most women who work for the Department are plainly harmed by the policy: they receive less in expendable wages than men, but receive no more in total income in return.

Further, for some women, as for some men, present income will be worth more than future income because of their particular circumstances, even if they do live to a ripe old age; they may have a pressing need for the money now, but have other means of assuring later income. For these women, and for women who have a good reason to expect that they will die early —those with a progressive disease, a family history of early deaths, or a smoking or drinking habit, for example—this difference is a difference in present value as well as in ultimate outcome. Such women, like similarly situated men, would, given the choice, be likely to choose a higher present income.

What the Department's program really does is to distribute among women only, and not among employees generally, the cost of paying retirement benefits to those comparatively few women who live longer than the average male. This is doubly injurious to the woman whose life expectancy is equal to or shorter than that of the average person: not only is she denied the benefit of present income, but she must absorb a greater portion of the cost of subsidizing women who do live longer than if that cost were distributed among all employees. The harm occurs because each woman is

being treated as the average woman, even if she departs in her life expectancy or in her economic priorities from the average. The fact that a relatively few women may not be injured under the scheme does not make the harm to those who are adversely affected any less real.

Thus, this is not a situation, as petitioners and their supporters seem to suggest, in which plain gender-based differences in treatment cause no injury. And, when such differences do harm individuals, the fact that other individuals placed in the same classification are not hurt is not relevant to a finding that the discrimination is unlawful.

For example, in *Stanton v. Stanton,* 421 U.S. 7 (1975), this Court considered the validity of a state law establishing different ages of majority for men and women. In the particular case, the woman declared an adult at 18 had suffered discernible harm; she had lost the right to support payments from her father. But the same statute was of benefit to women in other situations. For example, achieving the age of majority conveyed the rights to enter into binding contracts and to sue in one's own name (421 U.S., at 17); men who did not have these rights until age 21 could find themselves unable to obtain commercial credit for purchases, or could lose legal rights due them because of the inability to procure legal enforcement. The double-edged character of this gender-based rule may have influenced the ultimate remedy in the case, in that it made it difficult to determine what rule Utah would have chosen had it selected a uniform

majority age. *See id.,* at 17. But the fact that injury did not occur to all women, or solely to women—or, indeed, that the rule was as likely to benefit as to harm the "average" woman—certainly did not lead to the conclusion that no cognizable inequity existed. Rather, this Court, applying a more relaxed standard of review than that applicable here (see Part I, *supra),* concluded that "no valid distinction between male and female may be drawn." *Id.,* at 17.

Cases dealing with state statutes or regulations designed to protect women from oppressive employment conditions have raised similar issues under Title VII. In some cases, women have asserted that protective laws violate Title VII because their application limits employment opportunities for women. E.g., *Manning v. International Union,* 466 F.2d 816 (6th Cir. 1972), *cert. denied,* 410 U.S. 442 (1973); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969). In other cases, however, men have protested that the statutes grant women more favorable employment conditions. E.g., *Burns v. Rohr Corp.,* 346 F.Supp. 994 (S.D.Cal. 1977). And, while courts deciding these cases have often noted that at least some of the protective laws were based upon statistically valid assumptions about differences between women and men (e.g., *Bowe, supra,* 416 F.2d at 716-18), the courts of appeals have uniformly declared the statutes violative of the equality requirement of Title VII. For, establishing a violation of Title VII does not require a showing that a given rule is inequitable or injurious to an entire group, or even to a majority of the group.

A rule is invalid if it operates on the basis of a forbidden classification and harms some members of the group, even if it is fair or beneficial to others.[9]

It is argued that *Gilbert* approved of the "actuarial equality" approach to Title VII in the insurance context. As noted, however, the *Gilbert* case concerned a policy that was neutral on its face, rather than one expressly drawn along gender lines. Only women who incurred the excluded additional risk of pregnancy actually received less than complete disability coverage; all other women received the same benefits as men at no extra cost.

In the present case, in contrast, the Department's policy penalizes all women because of the risk presented by a few. Thus, *Gilbert* would be parallel to the present case only if the General Electric Company had covered pregnancy, but had provided all women with benefits at a lower level than men because of the extra risk of disability then presented by women as a group. In that event, it seems to us, the "actuarial equality" on a *group* basis could not obscure the fact that, among non-pregnant persons, only women, and not men, would be paying the disability costs of pregnant women.

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[9]We cannot conceive of a situation in which a plainly gender-based difference in treatment does not adversely affect some individual. For example, if the women here had received proportionately higher periodic benefits for their extra contributions, it might appear that there was a difference but no injury. But, to those women who did not want better retirement plans than men received because they preferred present income, and to those men who wanted the opportunity to have a higher retirement benefit even at a higher present cost, there would be harm.

Gilbert, therefore, did not involve the kind of evil with which Congress was most concerned when it prohibited employment discrimination: that persons in certain groups not be penalized for being members of that group. The discussion in *Gilbert* of actuarial equality was premised on the conclusion that no overt discrimination existed, and that the harm of being treated as an "average" woman rather than as oneself had consequently not occurred.[10]

B.

The group nature of insurance requires no special Title VII standard

The response of petitioners and amici appearing on their behalf to this analysis seems to be that insurance differs from all other situations in that insurance must operate on the basis of group averages, and that Congress therefore could not have

[10]Further, the Court in *Satty* explained that even as to the disparate impact analysis, the holding in *Gilbert* "did not depend on . . . evidence that the present actuarial value of the coverage was equal as between men and women." *Satty, supra,* slip op., at 7. Rather, the basis for the *Gilbert* decision was that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk, does not destroy the presumed parity of benefits . . . which results from the facially evenhanded *inclusion* of risks." 429 U.S. at 139.

The present case concerns no "additional risk unique to women." While there may be a difference in degree, men and women face the *same* risk—that they will live longer after retirement than the number of years of living expenses they could finance through savings. Thus, even if there is actuarial equality, the Department does not provide equal "aggregate *risk* protection" or "parity of benefits" (*Gilbert, supra,* 429 U.S. at 138-39; *see also Satty, supra,* slip op., at 7-8), since male employees can save the extra contribution amount and face old age in a better financial position than female employees.

intended to proscribe fringe benefit programs that treat men and women differently in situations in which pertinent statistically significant differences exist between men and women."[11]

But this is a nonsequitur; it does not follow from the indisputable fact that insurance must take into account large group norms that there is any "anomaly [in] attempting to apply traditional Title VII tests to insurance coverage offered employees as fringe benefits." Life Ins. Council Br., at 12. For, while "the fundamental principles of insurance are directed toward shifting economic risks of loss from an individual to a group" *(id.,* at 14), the issue here is not whether group averages may be used to distribute economic risks, but whether, because women live longer *on the average* than men, the total group may be subdivided so that a greater portion of the pooled risk is borne by women, in the form of higher contributions to the fund.

Practical experience alone demonstrates, despite petitioners' pronouncements to the contrary, that the operation of group pension plans does not inherently require individual members of any sub-group that presents a statistically significant higher risk to bear a proportionately higher share of the cost, either through higher contributions or through lower benefits.

[11]*See*, e.g., TIAA Br., at 26 ("[T]he continuing viability of such plans requires application of principles of risk classification . . . [S]uch classification is essential to the financial stability of any insurance plan.")

For example, the UAW has negotiated 1,500 pension plans covering almost 1.3 million employees. None of these plans differentiates on the basis of degree of risk of longevity in either the benefits paid employees when they reach ordinary retirement age or in differential employee contributions.[12]

Nor are the UAW plans unusual. Most of the pension plans negotiated by AFL-CIO affiliates are similar.

Indeed, as amicus Society of Actuaries admits, "most defined benefit plans in effect today . . . ordinarily provide for the payment of equal monthly pensions as a single life annuity at retirement, without regard to the sex of the retiring employees." Actuaries' Br., at 12. And, "defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare. . . ." *Id.*, at 18.

As the widespread existence of basically sex-neutral plans would suggest, the contentions of petitioners and their supporters that a sex-neutral approach to pension plans is "irrational" (Life Ins. Council Br., at 18; Actuaries' Br. at 23), economically impossible (Life Ins. Council Br., at 46; TIAA Br., at 26-27; Actuaries' Br., at 9-10), and fundamentally unfair (Life Ins. Council Br., at 14; TIAA Br., at 24; Actuaries' Br., at 10) are simply false.[13]

[12]The UAW plans do contain basic benefit differentials based upon length of service and salary, but none based upon any individualized or sub-group assessment of longevity.

[13]It may be true that it is the *practice* of private insurance companies to charge differential rates, or pay differential benefits, on the basis of sex. But the fact that something is done does not show that it is necessary. And, as discussed below, there are some economic differences between group employee benefit programs and individual insurance sales by private companies which indicate that whatever economic justification there may be for sex differentiation when purchase of insurance is voluntary does not apply when participation in a pension plan is a mandatory condition of employment.

1. *Rationality:* The first contention—that a sex-neutral plan is "irrational"—amounts to the claim that since the longer life expectancy of women as a group is statistically demonstrable, and since it is not possible to determine in advance which particular women will live longer, the only sensible approach is to treat women as a distinct sub-group for pension plan purposes. But, of course, there are many other simple ways in which one could divide a group of employees into sub-groups with statistically significant differences in life expectancy—for example, by smoking habits,[14] by race,[15] by state of residency,[16] or by age at onset of coverage.[17] In our experience, such differ-

[14]One study calculated that almost half the difference in life expectancy between men and women is actually attributable to the fact that men are much more likely to smoke. Rethorford, *The Changing Sex Differential in Mortality*, 104 (1975).

[15]*See* Actuaries' Br., at 11.

[16]The difference in life expectancy between residents of the District of Columbia and residents of Maryland is greater than the 4.3 year national difference between men and women. *See* U.S. Dept. of H.E.W., National Center for Health Statistics, *Vital Statistics of the United States* (December 14, 1977).

[17]Life expectancy in terms of age at death *increases* with age. *See* Metropolitan Life Ins. Co., *Statistical Bulletin*, at 10-11 (May, 1977). This is because all persons past a certain age have no possibility of dying at that age or younger, and people with lower death ages are therefore out of the pool that is available to compute average life expectancy. Retirement plans are concerned with the likelihood of living past the normal retirement age; this likelihood *increases* significantly for the reason just stated, with the age when first covered. Thus, a plan truly concerned with individual equity would charge higher contributions, or pay lower benefits, to workers older when they began working than to younger workers with equivalent years of service.

entiations are unheard of in group employee pension plans.

We are not suggesting here that the sex-differentiation would be any more valid under Title VII if other statistically significant indices of life expectancy were used as well. Rather, the point is that since this very pension plan, and other sex-differentiated pension plans, have operated successfully without subdividing potential beneficiaries into various other possible sub-groupings based on life expectancies, to denominate a sex-neutral approach as "irrational" or as requiring employers to ignore relevant and important considerations, is the result of "habit, rather than analysis or actual reflection . . . [,] the accidental byproduct of a traditional way of thinking about [sex differences]." *Califano v. Goldfarb*, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring.)

We are not contending that in setting undifferentiated contribution or benefit rates for the entire group of covered employees, actuaries may not consider the sex composition of the group. As the Society of Actuaries points out (Actuaries Br., at 19), such consideration is useful to establish the probable cost of various benefit levels. In practice, "the main determining characteristics [of cost] are the age composition, the service composition, the composition by sex and race, frequently the level of earnings, and what the probable future might hold for the particular group involved because of the changing economic picture." Fellers, "Pension Costs and Cost Experience," in Bureau of National Affairs, *Pensions and Profit Sharing*, 151 (3rd ed. 1964).

But the fact that it is useful to take sex as well as other factors into account in determining the benefits available to the entire group for a given cost, or the cost for given benefits, certainly does not indicate that benefits or costs, once determined, must be distributed by sex as well, or that it is "irrational" not to do so. Indeed, for reasons to be explained, it is the essence of group insurance, as opposed to individual insurance, that, to the degree possible, all members of the group be offered equal benefits at equal cost.

Moreover, even were it the practice, as it is not in most group insurance, to distribute benefits and costs according to sub-groupings demonstrating demonstrably different risks, it would still not be "irrational" to prohibit the application of this practice in particular instances. "[C]ertain classifications which may be perfectly feasible from an actuarial standpoint may be barred . . . for reasons of social policy. For example, black persons exhibit shorter longevity than white persons, but they are not charged a lower amount when they purchase [individual] annuities or a higher amount when they purchase life insurance." Actuaries' Br., at 11.[18]

In accordance with the principle that public policy considerations can prevent the use of certain classifications based on statistical showings that would

[18]TIAA claims that "at the higher ages (which are the ages relevant here), there is no significant difference in the longevity for white and non-whites." TIAA Br., at 6. While it is true that life expectancies after the usual retirement age, 65, are approximately equal for whites and non-whites, it is *not* true that this is the relevant question. Obviously, pension plans must concern themselves not only with how long people are likely to live after retirement but with whether they are likely to live long enough to retire at all. *See* n.17, *supra*.

otherwise be adequate, many of this Court's sex discrimination cases invalidating gender classifications,

> "have . . . rejected the use of sex as a decision making factor even though the statutes in question . . . rested on . . . predictive empirical relationships.
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> "In both *Frontiero* [*v. Richardson,* 411 U.S. 677 (1973)] and [*Weinberger v.*] *Wiesenfeld* [420 U.S. 636 (1975)] [this Court] expressly found appellees' empirical defense of mandatory dependency tests for men but not for women to be unsatisfactory, even though it recognized that husbands are still far less likely to be dependent on their wives than vice versa. . . . It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that *inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.* . . . In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups."
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> *Craig v. Boren,* 429 U.S. 190, 202 and n. 13, 204, 208 (emphasis added).[19]

[19]The fact that the prohibition against *per se* gender-based discrimination is tested under Title VII by a stricter standard of scrutiny than under the Equal Protection Clause (see Part I, *supra*) only heightens the import of the equal protection cases in this context. If objective statistical significance is insufficient to override "the normative philosophy that underlies the Fourteenth Amendment," it is certainly insufficient to override the express prohibition of Title VII unless the statutory defenses apply.

Nor is the insurance context distinguishable because it is not possible to determine with any certainty *which* women (and men) will ultimately live longer than the average person. While it would have been possible, although administratively inconvenient, to determine dependency in *Frontiero, Wiesenfeld* and *Califano v. Goldfarb, supra,* in other cases it was difficult or impossible to discover in advance precisely which individuals, men and women, had the trait which allegedly justified the gender-based discrimination. In *Craig,* for example, "there [was] no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J., dissenting). Nonetheless, "injury to all of the young men of the state [cannot] be justified by visiting the sins of the 2% on the 98%." *Id.,* at 214 (Stevens, J., concurring).[20]

The same was the case in *Stanton v. Stanton, supra.* While it "may be true that girls mature earlier than boys" (421 U.S. at 14), there is probably no practical way for the state to determine which girls are more mature or which boys less mature, or to legislate on the basis of maturity rather than gender.

[20]A similar problem could arise under Title VII itself. Automobile insurance statistics show women on the average to be safer drivers than men. And, it may not be possible, even using other indices of safe driving, to determine which men present special risks. Nonetheless, we assume that an employer could not hire only male drivers. "Since some men are safe drivers and some women are not, this type of policy constitutes explicit sex discrimination." Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1174 (1971).

Indeed, this case differs from *Craig* and *Stanton* in that if, for some reason, it is felt to be important to the success of a particular plan to separate out higher and lower risk persons, there are simple means to do so other than sex classification. Title VII would have no effect, for example, upon plans imposing special, actuarially determined surcharges upon non-smokers, or upon persons living in Maryland rather than the District of Columbia, *see* n.n. 14 & 16, *supra*.[21]

Thus, we are not suggesting that Title VII requires "irrational" decision making. To the contrary, it requires only that one kind of classification, which is in no way necessary, not be used, because to do so would contravene the plain public policy that individual women may not be penalized because of "the . . . tendencies of aggregate groups" of women. *Craig, supra,* 429 U.S., at 208.

2. *Economics:* The second contention—that it is economically essential to take sex into account in distributing costs and benefits in pension plans—is, of course, also belied by the widespread practice of established plans, which do not pay lower benefits at retirement age to women and do not charge them more. It is nonetheless worth examining the economic argument closely, because petitioners and their supporting amici place such great reliance upon it.

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[21]Even if more women than men, or more blacks than whites, do not smoke, or live in Maryland, there would be no *per se* discrimination under Title VII. *See Teamsters, supra,* 431 U.S. at 335, n.15.

The basic argument is that "[i]f individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own . . . they will eventually withdraw from the pool." TIAA Br., at 6; *see also* Actuaries' Br., at 9-10; Life Ins. Council Br., at 46. This theory is sensible to a degree when one is dealing with individual insurance sales.[22] But it entirely disregards a key ingredient of almost all employee group benefit plans, including this one: that participation by all employees is mandatory, and that adverse selection is therefore not a possibility. This factor explains both why sex-neutral employee pension funds are not collapsing as a result of their failure to discriminate against women, and why even sex discriminatory group pension plans such as the one in this case do not

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[22]Even then, the theory does not dictate *which* of all possible statistically significant sub-groupings are to be separated out for differential pricing or benefits, and thus does not compel gender differentiation. It would be administratively impossible, and counterproductive to the basic purposes of insurance, to calculate rates on the basis of all, or most known determinants of risks. At some stage, the premium would become so individualized as not to represent any "pooling" at all. At no point do any of the amici contend that gender is the best single feasible determinant of longevity, and they therefore have not explained why it is necessary to distinguish on the basis of gender rather than on the basis of another factor or factors.

Also, the adverse selection theory depends in part on an entirely free, unregulated market, which insurance decidedly is not. That is, if all insurance were available only on a sex-neutral basis, adverse selection would not be possible, because those who withdraw from one pool could not join another more advantageous to them. This is why, presumably, the race differential in longevity has not led to wholesale bankruptcy of insurance funds, as amici's arguments would suggest.

differentiate in other ways according to degree of risk.[23]

Apparently, in recognition of the inapplicability of the adverse selection theory to mandatory employee group insurance, two attempts are made to apply this theory in the group insurance context.

The first suggestion is that low risk employees can adversely select by declining employment where there is a nondiscriminatory policy for benefits. But, it is absurd to suppose:

[23]This benefit of mandatory coverage also shows that the concept that *per se* discrimination in group employee benefit plans should be tested by whether similar effects would occur if the contributions were converted to wages and then used to purchase individual insurance or annuities is misleading. Once contributions are converted into wages, the advantages of mandatory group insurance are lost: the savings in administrative cost disappear but, more important here, the possibility of adverse selection reappears. Thus high risk individuals, male and female, may have to pay more than others, and some may not be able to get individual insurance at all.

Moreover, pensions as such are not even available on the private market. While individual annuities can be purchased, these have entirely different characteristics than most employee pension plans and receive the tax advantages of pension plans only to a limited degree. Thus, there is no individual market substitute for employee pension plans, as unions which have put increasing emphasis on bargaining for benefits rather than for wages well know.

The failure of the deferred compensation approach can be seen most clearly by considering the following hypothetical: Suppose an employer paid all women a certain wage, and paid all men a lower wage, with the difference being contributed to a pension fund mandatory for men but not available to women. For the reasons just explained, the women could not expect to purchase on the private market an actuarially equivalent pension. There would plainly be a Title VII violation, even though the employer's cost for men and women was the same. Thus, the amount of an employer's contribution to a pension plan cannot be the relevant factor in determining equality, and employee benefit plans must be looked at from the perspective of benefits received.

> "that a male [employee] would consider any such differential [in life expectancy] in light of the equal manner in which male and female [employees] have qualified . . . and in light of the equal daily human needs which both male and female annuitants have, and upon such consideration would [decide] whether to accept [an] offer of employment. . . ."
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> *Reilly v. Robertson*, 360 N.E.2d 171, 177 (Ind. Sup.Ct. 1977).

While potential pension benefits may be a factor in determining whether to accept a particular job, it is only one of many factors; and, as to pensions, the basic concern will be whether the pension available is a good one, not whether it could be better by a tiny fraction if other employees received less. Furthermore, if our position in this case prevails, essentially all employment plans would be sex-neutral, so that adverse selection by choosing jobs that have sex discriminatory pension plans would not be a possibility.[24]

The second suggestion is that, while individuals cannot self-select, *groups* will do so—that is, employers with a primarily male work force will self-insure rather than purchase annuities from insurance companies at prices that reflect sex-neutral mortality

[24]The alternative of choosing a job without a pension plan and hoping to purchase a better annuity for oneself on the private market with resulting extra income is ordinarily not a possibility. See n.23, *supra*. The pension benefits received by men under the UAW and AFL-CIO affiliates' plans, for example, are incomparably better than individual annuities they could purchase with the contribution amount.

rates, thus altering unfavorably the risk composition of insured plans as a whole. *See* Life Ins. Council Br., at 46-47.[25] But, as noted earlier, we are not advocating that the contribution rates charged for the group as a *whole* may not take into account the sex composition of the work force. Our contention is only that *individuals* may not be charged more, or receive less, because of sex. Thus, for those plans funded through private insurance, there is no reason why rates cannot reflect the risk presented by each employer *group* as compared with other groups covered by the same insurer. Heavily male plans need not be disfavored in any way if our position prevails, and they will have no reason to abandon the insurance scheme.[26]

3. *Subsidization*: The final reason it is claimed that employee benefit schemes cannot be subjected to ordinary Title VII analysis is that to do so would force employers "to take some of the funds contributed by and for the men and pay those funds to the women," and that this would be "discriminatory in the extreme." TIAA Br., at 24; *see also* Life Ins. Council Br., at 44-45; Actuaries' Br.. at 10-11. But, of course, "subsidy" by those who do not incur a

[25]This argument, we take it, applies only to pension plans that are insured rather than trusteed. *See* Actuaries Br., A-7.

[26]There is another, practical factor as well which invalidates the Life Insurance Council's analysis: most large plans already self-insure, while most small plans cannot economically do so. Actuaries' Br., at 22; Life Ins. Council Br., at 46 n. 100. Thus, for most of the plans currently funded through insurance, withdrawal from the risk pool is not a possibility.

risk, of those who do, is at the core of insurance. Thus, unless insurance itself is unfair, there is nothing inherently inequitable when funds derived from contributions on behalf of one set of individuals are used to pay benefits to another set of individuals who live longer. That is why pension plans work at all.

Moreover, mandatory group benefit programs, in particular, rely on cross-subsidization of high risk persons by low risk persons. Because participation is mandatory, it is possible, at least in a large enough plan, to assume a representative cross-section of risks, and therefore to offer insurance to individuals who, because of the high risk they represent, could not obtain adequate benefits on the private market at an affordable cost.

An example may be useful here. Age at onset of coverage is a very strong predictor of age at death. That is, persons who are twenty-five can expect to live to be 74.8; persons who are forty can expect to live to be 75.8; and sixty year old people can expect to live to be 79.4. Metropolitan Life Insurance Co., *Statistical Bulletin,* at 10-11 (May, 1977); *see* n. 17, *supra.* Thus, persons who begin working at younger ages, or are younger when a pension plan begins, are plainly "subsidizing" those who are older at the outset. Yet, many new employee pension plans are designed in a way which exacerbates this imbalance: workers are given past service credit for pension calculation purposes even for years in which there were no contributions, and the funding of past service liability is then amortized over time.

The general perception is not that this system is unfair, but that it is an example of the benefits of group employee pension plans. For, in this way, it is possible to provide fair pensions for older workers in a manner which would be impossible with individual annuities purchased on the private market.[27]

Thus, the assertion that it is "discriminatory in the extreme" to have sex-neutral pension plans cannot be based on any fundamental inequity in providing equal benefits to higher and lower risk persons. Rather, that argument amounts to the contention that low risk *men* are somehow *entitled* to be assured that funds contributed "by and for them" are used to finance pensions only for high risk—for example, older—men, and not for high risk women as well.[28] Nowhere is it explained why low risk individuals who at any rate will be "subsidizing" others in the risk pool, have any fundamental right to be certain

[27]There are other prevalent examples as well. One is the practice of providing survivor's benefits at no extra cost to the employee. Plainly, where such benefits are available, single employees are "subsidizing" married employees.

Another instance is the recent negotiation of plans providing for full, or nearly full, retirement benefits after a specified number of years of service, regardless of age. Under such plans, persons who begin working at a young age receive benefits actuarially superior to those who begin working later, for they can receive benefits for many years longer. For example, the UAW "big three" automobile industry plans would permit an employee who started work at eighteen to retire with full pension benefits at 48.

[28]Under a sex-neutral plan, the 84% of men who live as long as 84% of women and therefore derive the same benefits from the plan as such women surely have no possible complaint. Indeed, they derive an extra benefit from the Department's present plan solely because other men don't live as long as some women.

that the group they are helping to fund is composed of their sex.

Thus, the repeated but unexplained assertions that sex-neutral benefits are somehow unfair graphically reflect the kind of rigid sex-classification approach to employment relationships which Title VII was designed to cure. If it is not "discriminatory in the extreme" for smokers to "subsidize" non-smokers, blacks to "subsidize" whites, residents of the District of Columbia to "subsidize" residents of Maryland, or younger workers to "subsidize" older workers—indeed, if this pooling of higher and lower risks is the central advantage of group employee pension plans—we fail to perceive any inherent inequity if the same process occurs between men and women.

4. *Indices of Legislative Intent:* Since the application of traditional Title VII sex discrimination standards to employee benefit plans is not inherently unworkable, there is no reason whatever to assume that ordinary Title VII coverage was not intended. A specific indication of purpose would have been necessary only if there had been a purpose *not* to apply the usual analysis to benefit programs.

There are, nonetheless, two suggestions that the language used in Title VII *was* generally understood by Congress to prohibit gender-based discrimination in pension plans. First, when Title VII was originally under consideration, there were proposals to include a ban on age discrimination as well as on race, sex, religious, and nationality discrimination. These proposals were rejected precisely because it was perceived

that the language of § 703(a) of Title VII would then prevent age distinctions in pension and retirement plans. *See* U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964,* at 3174 (1968).

Three years later, the Age Discrimination in Employment Act was passed. 29 U.S.C. § 620 *et seq.* Its affirmative prohibitions are cast in essentially the same language as those in § 703(a) of Title VII. *Compare* 29 U.S.C. § 623(a) (1) and (2) with 42 U.S.C. § 2000e-2(a) (1) and (2). Unlike Title VII, however, it contains an explicit exception for "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623 (f) (2).

In *United Airlines, Inc. v. McMann,* ..... U.S. ....., 46 U.S.L.W. 4043 (1977), this Court considered at length the history and purpose of this express exception in the Age Discrimination in Employment Act. From the materials there surveyed, it is clear that one reason the exception was thought necessary was the belief that without it, the bill would "not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." Hearings of S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., at 53 (1967), quoted in *McMann, supra,* ..... U.S. at ....., 46 U.S.L.W., at 4045. Section 623 (f) (2) was therefore added, to assure that "[a]n employer will not be

compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits he affords to younger workers." Remarks of Senator Javits, 113 Cong. Rec. 31255 (1967).[29] Thus, at least in 1967 and, presumably in 1964 when it rejected an "age" addition to Title VII because of the possible effect upon pension plans, Congress understood perfectly well that, without a specific exception, the language of Sections 703(a)(1) and (a)(2) of Title VII requires equal pension benefits and employee contributions for those classifications which are covered by the Act.

Second, and related, was a specific attempt in 1970 to add a parallel exception to Title VII itself. In that year, a bill to amend Title VII was passed by the Senate after extensive hearings. A similar bill was reported out by the House Committee on Education and Labor, but never reached the House floor. Those bills, S. 2453 and H.R. 17555, included the coverage for public employees, such as respondents here, which was eventually added by the 1972 amendments. *See* H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., at 2 (1971).

When H.R. 17555 was under consideration by the General Labor Subcommittee, Congressman Esch proposed an amendment which would have provided that:

> "[I]t shall not be an unlawful employment practice to observe a pension or retirement plan, the terms or conditions of which . . . provide for

[29]Senator Javits was the minority floor manager of the bill. *See* McMann, *supra,* ..... U.S. at ....., 46 U.S.L.W., at 4049 (Marshall, J., dissenting).

> . . . reasonable differentiation between employees, provided that such pension or retirement plan is not merely a subterfuge to evade the purposes of this title."

The Subcommittee accepted this amendment, which was quite similar in language, and seems to have been similar in intent, to the Age Discrimination Act exception enacted three years earlier. Before consideration by the full Committee on Education and Labor, however, the Representative who had been most responsible for persuading other members to take seriously the addition of sex discrimination to Title VII, Congresswoman Griffiths, wrote to the members of that Committee, explaining why the Esch amendment would be contrary to the premises of Title VII and had no practical necessity:

> "The effect of [this] amendment is so startling that it is hard to believe it. . . . It . . . simply repeals Title VII so far as concerns pension and retirement plans. . . .
>
> Title VII of the 1964 Civil Rights Act . . . makes it unlawful for any employer "to discriminate against any individual" on the basis of race, color, religion, sex or national origin with respect to "compensation, terms, conditions, or privileges of employment." The employee's option to retire at a certain age is clearly a "privilege" of employment, and the terms and benefits of a retirement plan are certainly derived from the employment relationship. Therefore, Title VII plainly prohibits discrimination with regard to pension and retirement plans on the basis of race, color, religion, sex, or national

> origin. Since the same language of Title VII applies to race discrimination as to sex discrimination, it is clear that both race and sex discrimination are not permissible with respect to pensions and retirement plans. . . .
>
> Sometimes I hear the argument that sex distinctions . . . are reasonable because of sex differences in actuarial mortality tables. Yes, women do live longer than men. . . .
>
> [But] there is no valid national need for the Esch amendment. Over 95 percent of all pension plans under collective bargaining reported pursuant to the Welfare and Pension Plans Disclosure Act contain no distinction between men and women workers. The other 5 percent contained sex differentials only as to the age required for participation in the pension plan or for retirement. . . . Furthermore, industry at present rarely makes sex the basis for differences in the pensions paid to the retired employee, or in the amount of credited service and earnings necessary to receive such benefits. Yet the Esch amendment would sanction and encourage sex discrimination in all of these aspects, and others, of pension and retirement plans, "notwithstanding any provision of Title VII." In [truth] the Esch amendment is so broad as to constitute virtually a blank check for sex discrimination in pension and retirement plans. . . .
>
> Since the Federal Civil Service and Social Security retirement systems operate effectively without broad scale sex discrimination, I see no reason why non-Federal pension and retirement plans cannot also operate effectively without sex discrimination. . . .

> The Esch amendment has no place in a country dedicated to the proposition of equality of opportunity regardless of race, color, religion, sex or national origin. It should be soundly rejected."
>
> Letter and Analysis by Martha W. Griffiths concerning the Esch amendment to H.R. 17555, 91st Cong., 2d Sess., in Congressional Information Service, *Discrimination Against Women,* at 380-382. (Bowker, Ed., 1973).[30]

The Esch amendment was apparently deleted by the full Committee in response to these arguments.[31] And, when the following Congress again considered, and passed, amendments to Title VII, including the amendment covering public employees which gave rise to the present cause of action, there was no attempt, as far as we can determine, to exclude pension plans from the Act's coverage.

In sum, the various arguments why Congress could not have intended to require that the usual Title VII analysis apply to pension plans all fail upon analysis, and there are specific indications that the language of Title VII was understood to require equality in both periodic benefits and employee contributions. Consequently, unless there is an applicable statutory exception, the Department's pension plan is invalid.

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[30]Congresswoman Griffiths' letter and analysis contain a persuasive discussion of some of the issues involved in this case and are therefore reproduced in their entirety in the Appendix to this brief.

[31]The bill as reported to the House floor contained no provision exempting pension plans from the full strictures of Title VII. *See* H. Rep. No. 91-1434, 91st Cong., 2nd Sess. (1970).

III

THE BENNETT AMENDMENT TO TITLE VII DOES NOT PERMIT EXPRESS GENDER-BASED DIFFERENCES IN EMPLOYEE BENEFIT PLANS

Since petitioners' pension plan entails express gender-based discrimination, and since there is no persuasive reason to believe that Congress intended special Title VII standards to apply to such discrimination in the insurance context, the plan must be found to violate Title VII unless it falls within one of the Act's specific exemptions. Petitioners and their supporting amici urge that the Bennett Amendment, which permits gender-based wage disparities under Title VII to the extent they are "authorized" by the Equal Pay Act, provides such an exemption.[32] An analysis of the Equal Pay Act reveals, however, that it does not "authorize" gender-based disparities in pension contributions or benefits.

The Equal Pay Act is Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. §206(d). It provides in relevant part:

> "No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establish-

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[32]The Bennett Amendment provides:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."
>
> 42 U.S.C. §2000e-2(h).

ment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on the jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."

Thus, gender-based discrimination in wages must satisfy two tests in order to be "authorized" by the Equal Pay Act and thereby exempted from Title VII under the Bennett Amendment: *First,* the discrimination must fall within the scope of the Equal Pay Act, i.e., it must affect "wages" as that term has been defined for purposes of the Fair Labor Standards Act, of which the Equal Pay Act is a part. *Second,* the disparity in wages must be authorized under one of the four exceptions set forth in the Equal Pay Act.

A.

The equal pay act does not cover employee benefit plans

Petitioners and their supporting amici have assumed the satisfaction of the first test, and have consequently centered their Equal Pay Act discussion on the second. It is our view, however, that benefit plans of the kind here at issue are not within the purview of the Equal Pay Act at all, and that the Equal Pay Act therefore cannot "authorize" any disparities with regard to them. For, it is quite plain

that such plans are not "wages" for purposes of the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), and that FLSA concepts apply under the Equal Pay Act.

As originally proposed, the Equal Pay Act would have been an independent statute. Both the House and Senate Committees to which the proposed legislation was referred, however, reported the bill out as an amendment to the FLSA. This was done in order to permit incorporation of longstanding definitions in and interpretations of the FLSA, so that the administration of the new Act would be facilitated. *See* S. Rep. No. 176, 88th Cong., 1st Sess., at 3 (1963); H. Rep. No. 309, 88th Cong., 1st Sess., at 2 (1963).

For example, the House Committee on Education and Labor explained that the bill was made a part of the FLSA "because both industry and labor have a long-established familiarity with existing fair labor standards provisions." H. Rep. No. 309, *supra,* at 2; *see also* S. Rep. No. 176, *supra.* And a number of Committee members including Congressman Goodell, the author of the amendment placing the Equal Pay Act in the FLSA, pointed out in their Supplemental Views that:

> "The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor."
>
> H. Rep. No. 309, *supra,* at 8; *see also* remarks of Senator McNamara, floor manager of the Senate bill, 109 Cong. Rec. 8914.

The concept of what constitutes "wages" is, of course, central to both the minimum wage provisions of the FLSA and to the Equal Pay Act. Since Congress inserted the Equal Pay Act into the very section of the FLSA that prescribes the minimum wage, Section 206, the definition of wages generally applicable under Section 206 must be pertinent to the interpretation of the Equal Pay Act. And mandatory employee contributions to employee benefit plans are *not* considered wages for the purposes of the minimum wage provisions of the FLSA. Under Section 206 of the FLSA, as this Court pointed out in *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707-08 (1945), "wages" are resources available for immediate use to meet daily needs:

> "[The Fair Labor Standards Act] constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce. . . . Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." (emphasis added).

The Court stressed the importance of *"prompt payment* to workers of wages." *Id.* at 707, n. 20.

Obviously, neither contributions to pension plans nor benefits to be received years later are available to meet present daily needs. For this reason, the Labor Department has consistently maintained, and courts

have agreed, that an employer may not count pension contributions made pursuant to an involuntary plan as "wages" for purposes of determining whether the employee has in fact been paid the minimum wage. *See* 29 C.F.R. §531.40; *see Brennan v. Modern Chevrolet Co.,* 363 F.Supp. 327, 332 (N.D.Tex. 1973).[33]

Aside from Congress's general intention to incorporate FLSA definitions and concepts into the Equal Pay Act, there are several specific indications that pension plans are not "wages" for purposes of the Equal Pay Act. First, Congress had the same concern with immediate purchasing power when it enacted the Equal Pay Act as when it passed the FLSA originally. *Compare* "Declaration of Purpose," Equal Pay Act, Section 2(a)(1), 77 Stat. 56, with "Declaration of Policy," Section 2(a), Fair Labor Standards Act of 1938, 52 Stat. 1060. *See also Shultz v. Wheaton Glass Co.,* 421 F.2d 259, 265 (3rd Cir. 1970). As Senator Hart stated:

> "We have long passed the time when women were allegedly working for 'pin money.' Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college—in addition to whatever

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[33] *Cf. Brennan v. Veterans Cleaning Service,* 482 F.2d 1362, 1369 (5th Cir. 1973) ("the minimum wage must normally be paid 'free and clear'."). *See also,* 29 C.F.R. §531.35.

Section 3(m), 29 U.S.C. §203(m), the definition section of the FLSA, does recognize that "wages" need not be cash. It defines "wage" to include the furnishing of "board" and "lodging" by an employer. This definition is quite consistent with the view that the focus of the FLSA is on immediate spending power. For, providing the sort of employee benefit counted as wages under §3(m) is the functional equivalent of cash: it furnishes directly the daily necessities for which cash would otherwise be used.

personal sense of achievement may be involved. The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?"

109 Cong. Rec. 8916 (1963).

Second, the Senate Committee Report recommending enactment of the Equal Pay Act specifically supports the notion that pension plan contributions were not considered to be "wages" under the Act. The Report points out that employers expressed concern about having to pay women the same wages as men because of allegedly higher costs associated with the employment of women. A key example was pension plan contributions:

"Some employees stated that the cost of their pension plans were higher for women than men because of . . . the longer life span of women in pension benefits."

S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963).[34]

If pension plans were considered "wages" under the Act, this concern would have been invalid, since the combination of women's lower wages and the higher pension contributions from employers would have

[34]Petitioners and some amici assert that by noting this concern, Congress approved of differential pension benefits for women. As we show later (*infra*, at 57-59), the quotation read in context leads to the opposite conclusion.

amounted to the same total "wages" received by men, thus eliminating the issue of "wage" discrimination.

Finally the Labor Department has always recognized that the term "wages" as used in the Equal Pay Act:

"is considered to have the same meaning it has elsewhere in the [Fair Labor Standards] Act. . . . As a general rule, in determining compliance with the equal pay provisions, the wages paid by the employer will be calculated pursuant to the same principles and procedures as have traditionally be [sic] followed in calculating such wages for purposes of determining compliance with the *minimum wage* provisions of the Act."

29 C.F.R. §800.110 (emphasis added).[35]

[35]On the precise question of whether pension plan contributions or benefits are "wages" for Equal Pay Act purposes, the Labor Department's position is less clear. On the one hand, 29 C.F.R. §800.116(d), the regulation upon which petitioners and their supporters principally rely, seems to suggest that they are wages, although all that is affirmatively said is that certain kinds of inequalities in pension plans are not "prohibited" by the Act. However, on February 3, 1967, some 18 months after Section 800.116(d) was promulgated, the Department published another regulation entitled "Particular Types of Payments as Wages." It provides:

"Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include . . . contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, *retirement*, life, accident or health insurance or similar benefits for employees."

29 C.F.R. §800.113 (emphasis added).

The Fifth Circuit has also expressed doubts that the Equal Pay Act covers fringe benefits similar to those in the present case.

Thus, while pension plan contributions and benefits are considered "compensation, terms, conditions and privileges of employment" under Section 703(a)(1) of Title VII[36] they are not considered "wages" under the Equal Pay Act, because they are not wages for purposes of Section 206 of the FLSA. Since pension plans are outside the scope of the Equal Pay Act, the Bennett Amendment, which applies only to discrimination in compensation authorized by that Act has no bearing on this case.[37]

In *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 723 n.1 (1970), that court states:

> "[I]t is far from clear that standard types of fringe benefits are eligible for inclusion in 'equal pay' determinations."

[36]"Congress intended Title VII to reach retirement plans as conditions of employment just as such plans are viewed as employment conditions under the National Labor Relations Act." *Peters v. Missouri-Pacific Railroad Co.*, 483 F.2d 490, 492 n.3 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 95 (3d Cir. 1973); *Bartmess v. Drewrys*, 444 F.2d 1186, 1188-1189 (7th Cir. 1971); *cf. Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[37]In *General Electric Co. v. Gilbert, supra*, the Court may have indicated that *disability* benefits under a *self-insurance* plan were wages under the Equal Pay Act. Unlike the pension contributions and benefits at issue here, however, the disability benefits in *Gilbert* were *temporary* wage substitutes similar to those payments described as Equal Pay Act wages under 29 C.F.R. §800.110, and not, as here, "contributions irrevocably made by an employer to a trustee or third person." 29 C.F.R. §800.113, promulgated the same day as §800.110. In addition, to the best of our knowledge, neither the parties nor the amici in *Gilbert* presented the Court with the issue of whether such benefits were in fact within the scope of the Equal Pay Act.

B.

If employee benefit plans are covered by the Equal Pay Act, that Act does not "authorize" express gender-based differences in such plans

Should the Court disagree with the preceeding analysis, it will have to determine whether the Department's gender-based disparities in pension contributions are "authorized" by one of the four "exceptions" to the Equal Pay Act.[38] Otherwise, the Bennett Amendment would not exempt the discrimination from Title VII.

1. *Exception (iv) to the Equal Pay Act:* The first three exceptions to the Equal Pay Act authorize wage disparties based on seniority, merit, and productivity

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[38]While ordinarily the Court could expect to be aided in making this determination by administrative practice, the agency regulations and guidelines applicable to this case are an internally contradictory morass, unhelpful to a decision on the pertinent questions. The Department of Labor's regulations simultaneously state: (1) that it is not clear that contributions to employee benefit funds such as this one are covered by the Equal Pay Act at all (29 C.F.R. §800.113); (2) that, perhaps, such plans *are* covered, but they are valid if the cost to the employer is equal for each sex even if benefits are not (29 C.F.R. §800.116(d)); (3) that it is, in general, not permissible under the Equal Pay Act for an employer to pay lower benefits ("wages") to members of one sex than members of another sex because of higher costs incurred on behalf of that sex as a group (29 C.F.R. §800.151); (4) that any wage differential is invalid under the Act if gender plays any part in its rationale (29 C.F.R. §800.142). And, to add to the confusion, the Department of Labor maintained in its brief amicus curiae in the court of appeals that in this case the Equal Pay Act was violated, but that if the employer had paid women lower benefits instead of requiring unequal employee contributions, it would not have been.

The EEOC, on the other hand, maintains unambiguously that *only* an equal benefits approach is permitted. 29 C.F.R. §1604.9. Since the two agencies whose interpretations are pertinent seem to disagree, and since at least one of those agencies does not even have an internally consistent approach, the best course, we believe, is for the Court to disregard all of the administrative interpretations and undertake the task of construction directly.

and do not apply to this case. 29 U.S.C. § 206 (d). Petitioners and their insurance supporters rely on the fourth, which permits disparities "based on any other factor other than sex." *Id.* By its very terms, however, exception (iv) does not apply to policies such as the one at issue here that are based on overt gender-based discrimination: overt discrimination is necessarily discrimination based on sex, not on a "factor other than sex."

Petitioners maintain, however, that exception (iv) must encompass policies that are not facially neutral but that correlate in a statistically significant fashion with one gender or another. Their argument is that if an employer does not intend to treat women and men differently, no discrimination "on the basis of sex" would exist, and an affirmative defense based on facially neutral principles would be unnecessary. Thus, petitioners contend, unless their view is accepted, exception (iv) would be meaningless.

This argument is belied not only by the common sense notion that a "factor other than sex" cannot be "femaleness" or "maleness," but also by the structure of the Equal Pay Act and its legislative history. The Act does not simply proscribe discrimination "on the basis of sex"; it *explicitly* defines that concept as:

> "paying wages to employees of one sex . . . at a rate less than the rate at which he pays wages to employees of the opposite sex."
>
> 29 U.S.C. § 206 (d).

The plain words of the statute make it an offense to pay a woman employee in a particular job less

than a male employee in the same job, unless there is an explanation based on seniority, merit, productivity, or "any other factor other than sex." Even without an announced policy or conscious decision to differentiate on the basis of sex, then, an employer violates the Equal Pay Act when he pays men and women in the same job different wages and has no explanation for the disparity "other than sex." Thus, the Equal Pay Act, like Title VII, not only prohibits *explicit* gender-based discrimination, but also provides that showing a gender-linked effect, or, in Title VII terms, a "disparate impact," suffices to make out a prima facie case and to shift the burden to the employer[39] to provide a non-gender-based reason for the disparity.

A hypothetical example of a "disparate impact" case concerning wage disparities in the pension context illustrates the point: If the contribution of individual employees were tied not to the employee's sex as in the present case, but rather to sex-neutral factors (e.g., age, family history, health, smoking habits), and if those with higher risks and hence higher contributions nonetheless turned out to be entirely or primarily women, the employer would be confronted with a prima facie case of gender discrimination premised upon "disparate impact." In that event, exception (iv) would provide him with the defense that the wage differential was based on

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[39]Under the Equal Pay Act, once it is shown that employees of one sex are paid at a different rate than employees of the other, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

"factor[s] other than sex," namely the sex-neutral criteria set forth above.

Both the legislative history of the Equal Pay Act and the Labor Department's implementing regulations are consistent with our view of the statute in general, and of the role of exception (iv) in particular. The House Committee Report closely ties exception (iv) to the other three, more specific sex-neutral exceptions:

> "As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded."
>
> H. Rep. No. 309, *supra*, at 3.

The Labor Department offers the following additional examples of factors that would justify wage differentials: "incentive payments . . . longevity raises . . . temporary assignments . . . training programs . . . temporary and part-time employees." 29 C.F.R. §§ 800.145-800.150. These exception (iv) factors, and exceptions (i), (ii), and (iii), all share the characteristic of being sex-neutral, and they differ on that ground from the factors cited by petitioners in the present case as reasons for their gender-based disparity in employee pension contributions.[40]

[40] 29 C.F.R. §800.142 provides:

> "Sex must not be a factor in excepted wage differentials. While differentials in the payment of wages are permitted when it can be shown that they are based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex, the requirements for such an exception are not met unless the factor of sex provides *no* part of the basis for the wage differential." (emphasis added).

This view, it appears to us, was accepted in *Corning Glass Works, supra,* where the Court held that even a shift differential is not a "factor other than sex" if, at the outset, women were barred from the higher paying shift.

Thus, Congress intended exception (iv) to the Equal Pay Act to include only sex-neutral factors, and it has consistently been interpreted in this manner. Many "factors other than sex" are encompassed within exception (iv) as thus interpreted, and petitioners' argument that only their strained construction of the language of the Act gives it any meaning is therefore without merit.

2. *Legislative intent as to pension plans:* While the Congressional purpose with respect to the general role of exception (iv) is quite clear, the legislative history upon the precise question of explicit gender-based differences in employee pension plans is sparse.

The only statements concerning sex-differences in employee benefit programs contemporaneous with the passage of the Equal Pay Act occurred in the context of a larger dispute not directly relevant here, concerning whether to regard generally higher costs of employing women as a "factor other than sex" justifying wage differentials. Petitioners and their supporters argue, citing carefully selected passages from the Senate Report and House floor debate on this question, that the Congress specifically intended to allow disparities in pension contributions under exception (iv).

See Pet. Br., at 16-17; TIAA Br., at 34; Life Ins. Council Br., at 41. When these passages are read in their original context, it is clear that Congress reached the opposite conclusion.

For example, after quoting the Senate Report's comment that "some employees stated that the cost of their pension and welfare plans were higher for women than men . . . because of the longer life span of women in pension benefits," (TIAA Br., at 34), TIAA concludes: "the Report then stated that such differences in cost would constitute a factor other than sex justifying a differential in wages." *Id.* When the quotation is read in context, however, we learn that the Committee *rejected* the notion that higher pension costs for women alone would justify a disparity. The Committee addressed the employers' concerns as follows:

> "This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the em-

> ployer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and *overall* cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that where it can be shown that on the basis of *all* of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an execption similar to those he can permit for a bona fide seniority system or other exception mentioned above."
>
> S. Rep. No. 176, 88th Cong. 1st Sess. 4 (1963) (emphasis added).

Similarly, petitioners and the American Council of Life Insurance rely on remarks made by Representative Goodell and Thompson as confirmation of their view that Congress intended to allow pension discrimination because of the higher cost of providing such coverage for women. Pet. Br., at 17; Life Ins. Council Br., at 41. As in the case of the Senate Report, however, the context of the two Representatives' remarks makes clear that their position was that, for costs to be considered an exception (iv) factor, the employer would have to analyze *all* costs, not just pension costs, and compare any overall cost

differential with possible differences in productivity. *See* 109 Cong. Rec. 9206-9208.[41]

The one other bit of legislative history on the question of gender-based disparities under the Equal Pay Act in employee benefit programs is a comment by Senator Humphrey following the passage of the Bennett Amendment. At that time, a year *after* the passage of the Equal Pay Act, Senator Humphrey stated in response to a question by Senator Randolph that "differences of treatment in industrial benefit

[41]The Labor Department's view, which we agree is the only sensible interpretation of the Act, is that the legislative history, when taken as a whole (*see* H. Rep. No. 309, *supra*), does not recognize even aggregate cost differentials between men and women as an exception (iv) justification. *See* 29 C.F.R. §800.151. This regulation on the subject convincingly points out:

> To group employees solely on the basis of sex for purpose of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex. . . . *Id.*

But the dispute regarding the aggregate cost issue is not here relevant. For, under either view, petitioners have failed to provide satisfactory justification for their use of gender in determining employee pension contributions: they have neither attempted to provide a sex-neutral rationale, nor have they produced any evidence that the pension disparity resulted from a detailed cost and productivity study that found that, in the absence of the disparity, the Department would incur higher overall costs in employing women. Indeed, the UAW and the AFL-CIO affiliates have found that the overall cost of employing men is usually higher than the cost of employing women, due to such factors as greater numbers of dependents for fringe benefit purposes, more expensive life insurance, and greater numbers of work-related disabilities.

plans, *including earlier retirement options for women*" were permissible under the Equal Pay Act. 110 Cong. Rec. 13663-64 (1964) (emphasis added). With due respect for Senator Humphrey, who surely ranks among the outstanding legislators to serve in the United States Senate, his comment reflects a misunderstanding of the Equal Pay Act. That Act deals only with *wage* discrimination; it has nothing to do with such matters as "early retirement options for women." *See* 29 U.S.C. § 206(d).

The Senator's inaccurate recollection of the Equal Pay Act is more easily understood when we remember that Senator Randolph questioned him in his role as "effective manager of the pending bill" (Title VII), one on which he clearly had special expertise. 110 Cong. Rec. 13663-64. Yet the question concerned an interpretation of the Equal Pay Act, not Title VII. His comments on the coverage of the Equal Pay Act cannot be construed as part of *its* legislative history. And, since the Bennett Amendment simply incorporates the Equal Pay Act, it is the intent of Congress when it passed *that* Act that must control.

[42]Two additional points concerning Senator Humphrey's remarks deserve mention. First, it appears from the examples given by Senator Randolph that Senator Humphrey understood the Senator to be referring to employment policies that accorded women special protections, such as the choice of early retirement, not policies that cause a women to receive lower wages for equal work. Second, just last term in *Califano v. Goldfarb*, 430 U.S. 199 (1977), this Court found unconstitutional the Social Security Act's differential treatment of widows' and widowers' benefits, another of the examples included in the Randolph-Humphrey colloquy. 110 Cong. Rec. 13663-64. (1964).

Thus, Section 703(h) of Title VII, the only defense possibly pertinent here is, upon analysis, not applicable. Even if pension contributions and benefits are, as we contend they are not, within the scope of the Equal Pay Act, the overt gender-based disparity in the Department's pension plan is not authorized by that Act and therefore is not exempted from Title VII by the Bennett Amendment.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Dated, December 21, 1977.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Appendix

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 8, 1970.

HON. CARL D. PERKINS,
House of Representatives,
Washington, D.C.

DEAR COLLEAGUE: It is ironic and tragic that a bill designed to strengthen the law against discrimination in employment should be perverted and distorted into a vehicle which, although initially designated to increase and perpetuate discrimination on the basis of sex, actually will authorize discrimination on the basis of race, color, religion and national origin, as well as sex.

Yet that is exactly what would happen under the amendment which Congressman Marvin L. Esch sponsored, and which the General Labor Subcommittee included, in the bill recommended to the House Education and Labor Committee—H.R. 17555, the "Equal Employment Opportunities Enforcement Act," to revise Title VII of the Civil Rights Act of 1964.

The Esch amendment would permit any employer to discriminate between employees in connection with pension and retirement plans, "notwithstanding any other provisions" of Title VII, and thus to do so on the basis of "race, color, religion, sex, or national origin."

The effect of his amendment is so startling that it is hard to believe it. Yet that is precisely what the

Esch amendment says. It thus simply repeals Title VII so far as concerns pension and retirement plans.

This matter I call to your attention in the hope that you, as a member of the Education and Labor Committee, will vote against the Esch amendment when the Committee considers H.R. 17555, which I understand will be in the next few days.

Title VII of the 1964 Civil Rights Act was a great milestone in the national effort to eliminate irrational bias in employment. It makes it unlawful for any employer "to discriminate against any individual" on the basis of race, color, religion, sex or national origin with respect to "compensation, terms, conditions, or privileges of employment." The employee's option to retire at a certain age is clearly a "privilege" of employment, and the terms and benefits of a retirement plan are certainly derived from the employment relationship. Therefore, Title VII plainly prohibits discrimination with regard to pension and retirement plans on the basis of race, color, religion, sex, or national origin. Since the same language of Title VII applies to race discrimination as to sex discrimination, it is clear that both race and sex discrimination are not permissible with respect to pensions and retirement plans.

The Esch amendment stems from the fact that the Equal Employment Opportunity Commission, acting pursuant to the historic mandate of Title VII, issued Guidelines on sex discrimination in February 1968 (33 F.R. 3344; 29 C.F.R. 1604.31) stating that a "difference in optional or compulsory retirement ages based on sex violates Title VII." These Guidelines were issued after extensive consideration by EEOC for over two years, plus comprehensive public hearings held in May 1967. The Commission also said that it would later rule (but it is still studying) whether other sex differences in pension and retirement plans, such as differences in annuity computations, benefits to survivors, etc., are valid under the equality mandate of Title VII.

The Bell Telephone companies, the principal lobbyists for the Esch amendment, have persistently sought to obtain legislative repeal of the EEOC ruling. They seek the amendment in order to retain their present pension and retirement systems, which discriminate in different aspects, against not only their women employees but also their male employees. This is but another example of sex discrimination by the telephone companies which have long relegated women to the lesser paid jobs in the communication industry. Telephone companies are defendants in some of the most significant court suits by their women employees protesting employment discrimination based on sex. Both the courts and the EEOC have repeatedly ruled against the telephone companies in sex discrimination cases. For example, Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (CA 5, 1969); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (N.D. Ala. 1969); Tuten v. Southern Bell Tel. Co., 2 FEP Cases 299 (M.D. Fla. 1969).

The Esch amendment is copied from the language proposed by the Bell Telephone companies which would legislatively sanction many types of sex discrimination, including such matters as optional retirement age, the age and employment tenure required for participation in pension plans, survivorship benefits, computation of amount of the pension, the date and conditions under which rights to annuities become vested, and other aspects of pension and retirement plans. However, the Esch amendment inexplicably omits the words "male" and "female", perhaps in order to obfuscate and veil its effect, and thus broadens it from a vehicle of sex discrimination to one which permits discrimination on the basis of race, color, religion, and national origin, as well as sex.

It is inconceivable to me that the Congress would adopt a provision which would sanction race discrimination in pension and retirement plans. Indeed, I am astonished that the Esch amendment is drafted so broadly, since the Bell Telephone companies lobbyists for this amendment have heretofore explicitly requested legislation to permit such discrimination only on the basis of sex. But even if the Committee amends the Esch amendment to restrict it to sex discrimination, it would still be contrary to our national policy of nondiscrimination and should not be adopted.

For your convenience I have prepared the attached analysis detailing some of the specific defects of the Esch amendment, with particular emphasis on its sex discrimination features. I hope you will read it before

you vote on H.R. 17555, and that it will persuade you to vote against the amendment, in its entirety.

With warm regards.

Sincerely yours,

MARTHA W. GRIFFITHS,
Member of Congress.

ANALYSIS BY MARTHA W. GRIFFITHS CONCERNING THE ESCH AMENDMENT TO H.R. 17555 (91ST CONG.)—THE "EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT"—TO PERMIT RACIAL AND SEX DISCRIMINATION IN PENSION AND RETIREMENT PLANS

The amendment sponsored by Congressman Marvin L. Esch to H.R. 17555, now pending in the House Committee on Education and Labor, would add the following new subsection to section 703 of Title VII of the Civil Rights Act of 1964:

"(k) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice to observe a pension or retirement plan, the terms or conditions of which permit but do not require certain employees to retire at earlier ages than other employees, or provide for other reasonable differentiation between employees, provided that such pension or retirement plan is not merely a subterfuge to evade the purposes of this title."

Title VII prohibits discrimination concerning "compensation, terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or

national origin." The Esch amendment permits discrimination "notwithstanding any other provision" of Title VII. Hence, the Esch amendment would permit discrimination, in pension and retirement plans, on the basis which Title VII prohibits, namely, race, color, religion, sex, or national origin.

Although the Esch amendment would apparently not sanction such discrimination in connection with compulsory retirement age, it would permit such discrimination in many other aspects of pension and retirement plans, including optional retirement age, the age required for participation in pension plans, survivorship benefits, computation of the amount of pension payments, the date and conditions under which rights to annuities become vested, and any other aspect which might be deemed a "reasonable differentiation between employees". However, the Esch amendment contains no definition as to what is a "reasonable differentiation" besides optional retirement age, and does not state any criteria by which to judge what discrimination is "reasonable". Hence, that phrase does not really limit the scope of the Esch amendment. Nor does the proviso that the pension plan should not be "merely a subterfuge to evade" Title VII provide any real protection against such discrimination. If the plan contains any element besides that which is a "subterfuge," the plan would then no longer be "merely" a subterfuge, even though it blatantly discriminates on a basis by Title VII. This is not an idle fear, in view of the recent decision by the U.S. Court of Appeals for the Fifth Circuit that sex discrimination in employment is permissible if it is associated with another element not prohibited by Title VII. *Phillips v. Martin Marietta Corp.*, 411 F. 2d 1; rehearing den., 416 F. 2d 1257 (C.A. 1969). The Supreme Court granted certiorari on March 2, 1970 (No. 1058, Oct. Term, 1969), and will hear, and I hope reverse, that decision next fall.

Sometimes I hear the argument made that sex distinctions in retirement ages are reasonable because of sex differences in actuarial mortality tables. Yes, women do live longer than men. When a man retires at 65, he will receive approximately 10 years of pension payments, while a woman who retires at 62 will receive approximately 20 years of such payments. If any sex is entitled to an earlier optional retirement age privilege, it should be the male. Frankly, no sex differential is reasonable for retirement age, and the Esch amendment would simply permit unwarranted discrimination based on sex.

There is no valid national need for the Esch amendment. Over 95 percent of all pension plans under collective bargaining reported pursuant to the Welfare and Pension Plans Disclosure Act contain no distinction between men and women workers. The other 5 percent contained sex differentials only as to the age required for participation in the pension plan or for retirement. (Incidentally, the pension plans of the Bell Telephone companies, the principal lobbyists for the Esch amendment, affect the most employees.) Furthermore, industry at present rarely makes sex the basis for differences in the pensions paid to the

retired employee, or in the amount of credited service and earnings necessary to receive such benefits. Yet the Esch amendment would sanction and encourage sex discrimination in all of these aspects, and others, of pension and retirement plans, "notwithstanding any provision of Title VII." In trust, the Esch amendment is so broad as to constitute virtually a blank check for sex discrimination in pension and retirement plans.

Neither the Federal Civil Service nor the Social Security retirement systems provide for different retirement ages as between men and women, whether for compulsory retirement or for optional retirement. Both systems are totally devoid of sex discrimination, except for two aspects. One aspect, which will be abolished by the Social Security Amendments of 1970 passed by the House on May 21, 1970 (H.R. 17550), concerns the difference in computing benefits for Social Security retirees under which men retiring between ages 62 and 65 receive lower pensions than women retiring at such ages. The other aspect concerns survivorship benefits, which are granted to a male employee's widow without requiring her to show that she was the employee's dependent, but are not granted to a female employee's widower unless he shows he was the employee's dependent. This distinction is based on a concept of welfare, rather than compensation for work performed, and I have introduced bills to end this distinction and to put widowers and widows on the same footing for survivorship benefits based on their spouse's employment. I believe

the dependency distinction between widows and widowers will eventually be abolished. In any event, it does not justify the broad and virtually unlimited sex discrimination which the Esch amendment would permit and encourage in all non-Federal pension and retirement plans.

Since the Federal Civil Service and Social Security retirement systems operate effectively without broad scale sex discrimination, I see no reason why non-Federal pension and retirement plans cannot also operate effectively without sex discrimination.

There may be some women who would want to take advantage of an earlier optional retirement age than is available to their male colleagues. But their concern must be balanced against the fact that the disadvantages of sex differentials in pension and retirement plans far outweigh that particular benefit. Permitting sex discrimination in relation to optional retirement will foster the continuation of discrimination now practiced against women who are able and desire to work beyond the optional retirement age. Experience has shown that where such earlier option exists, many employers deny promotion to qualified women on the ground that they may be retiring at an earlier age. In addition, many employers also exert pressure on women to retire at the earlier age in order to replace them with younger women or men. The earlier optional retirement age privilege is not an unalloyed benefit to women. Finally, with respect to the small group of women who are now near retirement age and who might have planned to retire under the op-

tional privilege, it should be noted that the Equal Employment Opportunity Comission announced, on September 16, 1968, that it would construe the Guidelines on sex discrimination as permitting women workers, who were then within 10 years of retirement age under existing retirement plans permitting optional retirement, to retain their right to exercise that option. That E.E.O.C. ruling certainly destroys any possible argument that the equality mandate of Title VII is unfair to any women having a sex discriminatory preference under an existing retirement plan.

We should also consider the source of the argument that sex differentials in optional retirement ages favor women and, therefore, should not be abandoned. That argument is not supported by the almost 200,000 member National Federation of Business and Professional Women's Clubs, a traditional protector of the rights of the working woman, or by the Citizen's Advisory Council on the Status of Women, or by the National Organization for Women whose goal is "full equality for women in truly equal partnership with men," or by the National Woman's Party which has fought for women's rights since the early 1900's. On the contrary, the principal lobbyists for the Esch amendment are the Bell Telephone companies who have long relegated women to the lesser paid jobs in the communications industry, and who fear that the elimination of sex differences in retirement age may result in earlier retirement for men, or longer service and increased credits for women, and thereby increase the companies' pension costs. I don't know why the

Bell Telephone companies are worried about this, since the hearings before the Joint Economic Committee's Subcommittee on Fiscal Policy, of which I am chairman, revealed that in 1966 those companies had over $5 billion in their pension trust funds and had never paid out one cent of the principal—all pensions are paid entirely from the interest earned by the trust funds. Hearings on Private Pension Plans, 89th Congress, Part One (May 2, 1966), pp. 228, 235.

Furthermore, I find it difficult to understand the reasoning that a system which discriminates in some ways against men rather than against women should, therefore, be continued. We in the Congress are elected by all the people, men and women, and it ill behooves us to discriminate against either men or women solely on the basis of sex. Indeed, I resent the implication that women should be favored over men on the assumption that women are incapable of withstanding unprotected the rigors of economic life and hence must be especially protected and favored by the law. Whatever validity that concept had five or six decades ago, it has none today. According to the 1969 Handbook on Women Workers published by the Department of Labor (Women's Bureau Bulletin 294), women head 11 percent of all families (page 28), and comprise 37 percent of our total labor force 16 years of age and over (pages 9, 10, 22). Women are now certainly entitled to be rid of the "adult children" myth which brands them as incapable of equal participation in our present economy. They are willing to

take their chances with equal privileges if society will but grant them equal opportunities.

Moreover, while the direct effect of an earlier retirement age for women primarily discriminates against men, its indirect effect also discriminates against women,—namely, the wives nad families of male employees who are denied retirement age privileges available to female employees. Discrimination is a seamless web. If we permit it to exist against the interests of one group, it will inevitably work against the interest of the other.

The Esch amendment has no place in a country dedicated to the proposition of equality of opportunity regardless of race, color, religion, sex, or national origin. It should be roundly rejected.

Thank you for permitting me to express my views on Section 805 of your bill, H.R. 16098. I fully suport that section and will work with you to obtain its enactment.